

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

EL PASO COUNTY, TEXAS; BORDER
NETWORK FOR HUMAN RIGHTS,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States of America, *et al.*,

Defendants.

Case No. EP-19-CV-66-DB

DEFENDANTS' SUPPLEMENTAL BRIEF ADDRESSING SCOPE OF REMEDY

The Court should reject Plaintiffs' proposal to enjoin the Government's entire "wall funding plan"—an overbroad nationwide injunction against use of 10 U.S.C. § 284 and 10 U.S.C. § 2808 to engage in border barrier construction. Pls.' Supp. Br. Re. Remedy 5–6, ECF No. 130. Injunctive relief never "follow[s] from success on the merits as a matter of course," *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008), and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971). Here, Plaintiffs' arguments and the Court's decision demonstrate that there is no basis for a sweeping injunction—indeed, there is no basis for an injunction at all.

Applying traditional principles of equity, no injunction should issue in this case because Plaintiffs have not established any irreparable injury and the Government's compelling interests in constructing barriers along the southern border pursuant to § 284 and § 2808 to counter illegal drug activity and support the use of the armed forces dramatically outweigh Plaintiffs' purported reputational, economic, and organizational resource interests. Further, Plaintiffs' proposed injunction conflicts with the Supreme Court's recent order staying an injunction issued by another district court

stopping all § 284 construction that similarly relied upon arguments that the Government was precluded from transferring money to fund border barrier construction. *See Trump v. Sierra Club*, --- S. Ct. ---, 2019 WL 3369425 (U.S. July 26, 2019). There is no basis for this Court to issue an injunction that would directly contradict that decision from the Supreme Court.

Moreover, the Consolidated Appropriations Act, 2019 (“CAA”), Pub. L. No. 116-6, 133 Stat. 13, is a particularly inappropriate basis for the sweeping injunction Plaintiffs now seek. The restrictions in that Act apply only to the projects authorized in that Act, not to different projects authorized by different statutes and funded through different appropriations legislation. Plaintiffs appear to have initially recognized as much when they sought an injunction barring only the use of CAA funds for border barrier construction. First Proposed Order, ECF No. 130-1. Plaintiffs subsequently reversed course and filed a different proposed order (ECF No. 133) that seeks to enjoin the use of *all* sources of funding throughout the *entire* federal government for § 284 or § 2808 projects regardless of whether that money comes from the CAA’s appropriations or is subject to the CAA’s terms. But Plaintiffs cannot cogently explain how the CAA’s precise language could support relief that sweeps beyond the CAA and the projects it authorizes to enjoin the use of money Congress elsewhere appropriated for the purposes for which it was appropriated.

Plaintiffs have also failed to show that a nationwide injunction to halt all construction activity along the southern border under § 284 and § 2808 is necessary to redress their narrow allegations of harm. Plaintiffs have not presented any evidence whatsoever of irreparable injury to warrant this Court enjoining any border barrier projects. They have no basis for challenging projects in California, Arizona, or the Laredo Sector of Texas. Indeed, there are no challenged border projects in El Paso County and the closest of the § 2808 projects in New Mexico begin about *100 miles away* from downtown El Paso.

Finally, the President’s Proclamation should be excluded from the Court’s declaratory

judgment. An injunction or declaratory judgment implicating the Proclamation would necessarily run against the President, who issued the Proclamation in his official capacity. There is no legal basis to issue such extraordinary relief.

For these reasons, as explained further below, Defendants respectfully request that the Court reject Plaintiffs' proposed order and decline to enter an injunction.

I. An Injunction Is Not Appropriate Here.

To obtain any injunction, a plaintiff must show “(1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–58 (2010). “[I]njunctive relief is a drastic remedy, not to be applied as a matter of course.” *See O'Donnell v. Harris Cty.*, 892 F.3d 147, 155 (5th Cir. 2018) (quoting *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977)).

In *Winter*, the Supreme Court reversed a preliminary injunction prohibiting the Navy from using sonar technology in training exercises at sea, where plaintiffs claimed the sonar would injure them because they “observ[ed]” and “photograph[ed]” marine mammals in the area and “conduct[ed] scientific research.” 555 U.S. at 13–14, 25–26. In reversing, the Supreme Court explained that “the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises, and the injunction’s consequent adverse impact on the public interest in national defense,” which “plainly outweighed” the harms asserted by the plaintiffs. *Id.* at 24, 33. And the Court explained that its “analysis of the propriety of preliminary relief [wa]s applicable to any permanent injunction as well,” which requires consideration of the same equitable factors. *Id.* at 33. Applying those same considerations here, no injunction should issue against construction under either § 284 or § 2808.

A. Plaintiffs Have Not Carried Their Burden To Establish an Irreparable Injury.

Respondents respectfully disagree with the Court’s conclusion that Plaintiffs have Article III standing, but standing, by itself, is not a sufficient basis for a permanent injunction. Standing is a different, separate inquiry from the irreparable harm needed for an injunction. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974). Indeed, “irreparable harm must be proven separately and convincingly.” *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989). Plaintiffs cannot meet this burden. As an initial matter, Plaintiffs have not submitted any evidence whatsoever to establish they are injured by specific § 2808 projects that DoD plans to undertake, as all of their declarations pre-date the Secretary of Defense’s decision. Further, the Supreme Court has recognized that reputational harm “falls far short of the type of irreparable injury which is a necessary predicate to the issuance” of an injunction. *Sampson v. Murray*, 415 U.S. 61, 91–92 (1974). El Paso County’s purported reputational injury from the President’s proclamation itself thus cannot serve as the basis for injunctive relief against construction pursuant to statutory authorities dependent on that proclamation.

El Paso’s purported loss of tax revenue from the deferral of the roads project at Fort Bliss also cannot support a finding of irreparable injury. That “type of economic loss,” arising as an indirect effect of DoD’s unreviewable choice of which projects to defer to address the undisputed emergency at the border, “is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing,” much less irreparable injury. *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976)).

Any decision to the contrary would conflict with *Wyoming v. Oklahoma*, the Supreme Court’s leading case in this area and one that the Court did not address in its opinion. 502 U.S. 437 (1992). There, the Supreme Court recognized standing to challenge “a direct injury in the form of a loss of

specific tax revenues,” but distinguished cases where “actions taken by United States Government agencies [have injured their] econom[ies] and thereby caused a decline in general tax revenues.” *Id.* at 448. In reaching that conclusion, the Supreme Court emphasized that States must establish a direct link between the tax at issue and the administrative action being challenged to meet the requirements for Article III standing. *Wyoming* concerned a law enacted by Oklahoma that required Oklahoma utility companies to use a certain percentage of Oklahoma coal. *See* 502 U.S. at 443–44. Prior to the law’s enactment, Oklahoma utility companies used nearly 100% Wyoming coal, for which Wyoming charged a specific severance tax for extracting coal from the state. *Id.* at 445. After the law’s enactment, Oklahoma businesses purchased less Wyoming coal, reducing Wyoming’s severance tax revenues accordingly. *Id.* at 446–48. The Supreme Court held that the direct link between Oklahoma’s law targeting coal usage and a specific stream of tax revenue based on coal extraction was sufficient to support Wyoming’s standing to sue. *Id.* at 447. The direct causal connection that the Supreme Court found critical to the finding of an injury in *Wyoming* is not present in this case, as El Paso merely asserts generalized allegations of harm resulting from reduced tourism and business development, as well as the deferral of the roads project at Fort Bliss. Indeed, Judge Samaniego, who is responsible for the County’s tax rate and budget, has not claimed *any* loss of revenue arising from the national emergency declaration or border barrier construction; he only raises the threat of generalized “economic harm.” Decl. of Ricardo Samaniego ¶¶ 2, 16 ECF No. 55-26. That failure is fatal to plaintiffs’ claims and to their request for equitable relief.¹

BNHR’s diversion-of-resources theory fares no better. It has not presented sufficient evidence to carry its burden that it will suffer an irreparable injury in the absence of its requested injunction. BNHR have not established that its reallocation of resources has imposed concrete

¹ Although *Wyoming* addressed Article III standing, its rationale applies *a fortiori* to the higher standard of irreparable injury that Plaintiffs must satisfy for injunctive relief.

irreparable harms beyond simply undertaking a different form of border policy advocacy.

B. The Balance of Equities and Public Interest Weigh Against Injunctive Relief.

1. Section 284 Construction Should Not Be Enjoined.

The balance of equities and public interest also tip decidedly in the Government’s favor. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that these factors merge when the government is a party). The Supreme Court has recognized that the Government has “compelling interests in safety and in the integrity of our borders,” *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989), and a permanent injunction with respect to the § 284 projects would prohibit the Government from taking critical steps needed to prevent the continuing surge of illegal drugs from entering the country through the southern border. *See also United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009) (Government has a “strong interest[]” in “interdicting the flow of drugs” entering the United States). DHS identified the § 284 barrier projects at issue because of the high rates of drug smuggling between ports of entry in those areas of the border, and the record includes ample evidence of both the severity of the problem and the limited effectiveness of the existing barriers in those areas, which transnational criminal organizations have adjusted their tactics to evade. *See* ECF No. 95-6. None of this evidence was called into question by Plaintiffs’ arguments or the Court’s summary judgment order.

These undisputed harms “plainly outweigh[]” plaintiffs’ asserted injuries arising from construction of a § 284 project in Luna County and Dona Ana County, New Mexico, just as the harms from prohibiting the Navy’s sonar testing did when balanced against the plaintiffs’ observational and scientific interests in *Winter*. 555 U.S. at 26, 33. Moreover, Plaintiffs’ asserted reputational, economic, and organizational harms, which arise principally from the Proclamation’s message, have essentially no connection to the legal violation of the CAA that the Court identified. Given that, and in light of the Government’s weighty and undisputed interest in undertaking projects to assist with drug

interdiction at the southern border, it would be an abuse of discretion for this Court to award the “extraordinary remedy” of a permanent injunction on § 284 construction to provide Plaintiffs relief from the specific violation the Court identified. *Winter*, 555 U.S. at 22.

Further, the Supreme Court has already stayed an injunction issued by another district court prohibiting DoD from proceeding with the § 284 border barrier projects. *See Trump v. Sierra Club*, --- S. Ct. ---, 2019 WL 3369425 (U.S. July 26, 2019). In issuing the stay order, the Supreme Court necessarily determined that the balance of the equities tipped in the Government’s favor. *See Nken*, 556 U.S. at 434 (stay factors include irreparable injury, the balance of hardships, and the public interest). Consequently, there is no basis for this Court to issue an injunction regarding the § 284 projects that would effectively override the Supreme Court’s order.

2. Section 2808 Construction Should Not Be Enjoined.

The equities are even more lopsided with respect to § 2808 construction. The President declared a national emergency because of the large number of aliens attempting to cross the border and the significant quantities of illegal drugs that are smuggled across the border each year. *See* Presidential Proclamation on Declaring a Nat’l Emergency Concerning the S. Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019); Veto Message for H.J. Res. 46, 2019 WL 1219481 (Mar. 15, 2019); Veto Message for S.J. 54, 2019 WL 5206087 (Oct. 15, 2019). The President has also determined that the unique skills and resources of the armed forces are required to confront this crisis. *See id.* Further, the Secretary of Defense has concluded, based on detailed input from the Chairman of the Joint Chiefs of Staff, that the § 2808 border barrier projects are necessary to support the use of the armed forces in the context of their support to DHS at the southern border. *See* Administrative Record (ECF No. 123) at 1–11; 42–75; 97–137. The Government and the public thus have a compelling interest in ensuring that its military forces are properly supported and have the necessary resources for mission success, and the Court must defer to that determination. *See Goldman v.*

Weinberger, 475 U.S. 503, 507 (1986) (courts must “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”); *Winter*, 555 U.S. at 25 (military training and readiness are of the “utmost importance to the Navy and the Nation”).

Plaintiffs’ alleged injuries arising from § 2808 projects are no weightier than they were in the context of § 284 construction. In many respects, they are weaker. The three declarations supporting Plaintiffs’ assignments of harm were all submitted well before the Secretary of Defense made any decisions regarding where § 2808 construction would take place. Plaintiffs have adduced no evidence, other than the speculation of their attorneys, that § 2808 projects—the closest of which, again, begins about 100 miles away from downtown El Paso, *see* AR at 11—will have the same impact as the lone § 284 project in the El Paso sector, “which is only 15 miles from downtown El Paso,” Decl. of Betsy Keller ¶ 13, ECF No. 55-25. And the loss of \$20 million to Fort Bliss, as opposed to the Plaintiffs directly, fails to suffice as a basis for irreparable harm because Plaintiffs have only alleged generalized economic harm due to this decision, rather than the loss of a specific tax revenue stream. Samaniego Decl. ¶¶ 14–16.

Moreover, because equity must conform to the “nature of the violation” identified by the Court, *Swann*, 402 U.S. at 16, Plaintiffs’ purported reputational, economic, and organizational diversion-of-resources injuries arising from the message of the Proclamation are not a cognizable basis for awarding injunctive relief. “A district court abuses its discretion if it issues an injunction that ‘is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue.’” *O’Donnell*, 892 F.3d at 155 (quoting *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016)). Here, the “substantive law” that formed the basis of the Court’s opinion was the CAA; the Court did not conclude that the Proclamation itself was unlawful because it improperly recognized the situation at the southern border as a national emergency requiring the use of the armed forces.

Accordingly, there is no basis to award injunctive relief based on harm that the Proclamation itself allegedly caused.

In sum, the balance of equities tips sharply in favor of the Government given the compelling interests in supporting military forces and in protecting the safety and integrity of the Nation's borders, as compared to Plaintiffs' reputational and resource interests.

II. Plaintiffs' Original Proposed Injunction Would Not Have Impacted Border Wall Construction and the Court Should Reject Plaintiffs' Revised Proposal as Overbroad

Although injunctive relief would not be appropriate on any basis, Plaintiffs' original proposed injunction focused on the Court's rationale that the border construction violates the CAA, asking this Court to declare that "using funds appropriated by the 2019 Consolidated Appropriations Act for 'military construction' under 10 U.S.C. § 2808, and 'support for counterdrug activities' under 10 U.S.C. § 284, is unlawful," and to enjoin relevant Cabinet officers and agency officials "from border wall construction using funds appropriated by the 2019 Consolidated Appropriations Act" under either authority. *See* Proposed Order, ECF No. 130-1. But no "funds appropriated by the 2019 [CAA]" are being used to carry out the disputed construction, as this Court has already recognized. Order 30–31, ECF No. 129. Indeed, that recognition itself demonstrates why an injunction is not appropriate here. Because the Court's summary judgment was based on its interpretation of the CAA, there is no basis for an injunction that goes beyond the terms of that statute.

Funding for § 284 construction is not based on funds appropriated by the CAA but is derived from transfers within DoD's appropriation, which was separately enacted months before the CAA's passage and the President's Proclamation. *See* Department of Defense, and Labor, Health and Human Services, and Education Appropriations Act, 2019, And Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (Sept. 28, 2018). Further, funding for § 2808 construction comes from transfers of unobligated military construction funds, which are separately appropriated to DoD. *See*,

e.g., Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, div. C, tit. I (Sept. 21, 2018). Plaintiffs' original proposed injunction would have had no impact on the Government's disputed construction activities at the southern border, all of which are distinct projects authorized by different statutes and funded by different appropriations.

Recognizing as much, Plaintiffs have now filed an amended order that broadens the CAA's narrow restrictions into a blanket prohibition against border barrier construction using unrelated statutory authorities and separate appropriations. *See* ECF No. 133.² But Plaintiffs have identified no basis for expanding the CAA's domain beyond its terms to impliedly prohibit § 284 or § 2808 projects.³ The CAA does not expressly or impliedly prohibit § 284 or § 2808 projects funded by appropriations in other statutes. Although the CAA "states that none of the funds *appropriated by [the CAA]* can be used 'for the construction of pedestrian fencing' in any of the five other areas of the border," the funds to be used for § 284 or § 2808 construction were not appropriated by the CAA and are thus unaffected by that provision. Order 27–28. The "general principle of statutory interpretation" that "a more specific statute will be given precedence over a more general one," *see Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (quotations omitted), does not prohibit the use of funds appropriated by Congress in *different* appropriations acts (the DoD Appropriations Act and annual military construction appropriations), to a *different* executive branch agency (DoD), in order

² Plaintiffs moved to amend their order (ECF No. 131) without first conferring with Defendants about their position, as required by the local rules for any non-dispositive motion. W.D. Tex. L.R. CV-7(i). Defendants acknowledge the Court granted Plaintiffs' motion (ECF No. 132), but Defendants nonetheless object to Plaintiffs belated attempt to expand the scope of their proposed order.

³ In addition, the CAA does not contain a private cause of action, and because Plaintiffs do not plausibly fall within the zone of interests protected by an appropriations statute that funds none of the disputed activities in this case, they cannot use the Appropriations Clause or the Administrative Procedure Act to bring such a claim. Defs.' Rep. Br. 20–21, ECF No. 106.

to exercise *different* statutory authorities conferred on that agency by permanent legislation (§ 284 and § 2808). Likewise, the prohibition in § 739 of the CAA on adding funds from another appropriation to *DHS's* appropriation is no obstacle to *DoD's* use of § 284 and § 2808 because those *DoD* statutes do not increase funding for any “program, project, or activity” within one of *DHS's* accounts, as that term is understood in the appropriations context. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process* 80 (Sept. 2005) (defining “program, project, or activity” as an “[e]lement within a budget account”); *see* 31 U.S.C. § 1112 (GAO is statutorily required to publish and maintain standard terms related to the federal budget process).

III. The Scope of Plaintiffs’ Proposed Injunction Is Not Appropriate.

Even if the Court disagrees with Defendants’ arguments against the entry of injunctive relief, it should, at most, enter an injunction commensurate with the legal violation the Court identified. When a court sits in equity, “the nature of the violation determines the scope of the remedy.” *Swann*, 402 U.S. at 16 (1971); *see O’Donnell*, 892 F.3d at 155. As such, an injunction “should be no more burdensome to the defendant than necessary to provide complete relief.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (“The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order.”). Plaintiffs’ demand for an injunction prohibiting the entire “funding plan” for additional barriers along the southern border—effectively, a nationwide injunction—conflicts with these basic principles.

In the context of § 284, Plaintiffs’ declarants only submitted statements about harms arising from the one project slated for Dona Ana County and Luna County, which is also being challenged by the State of New Mexico in litigation now on appeal in the Ninth Circuit. *See* Keller Decl. ¶¶ 13–14; Samaniego Decl. ¶¶ 17–20; Decl. of Fernando Garcia ¶¶ 33–37, ECF No. 55-27 (same). Even these alleged harms are thin, unsubstantiated, and caused not by any transfer of funds, but by the decision to use § 284 for construction in that area. Plaintiffs have submitted no evidence that the

proposed § 2808 projects—the closest of which is nearly 100 miles away from downtown El Paso—will have any impact on the County’s residents or BNHR itself.⁴ The Court’s legal conclusions regarding the expenditure of other appropriations as a violation of the CAA do not implicate the legal validity of the national emergency declaration, which was the principal basis for Plaintiffs’ claims of reputational, economic, and organizational harm. *See* Keller Decl. ¶¶ 6–12 (describing negative impact of the allegedly false message sent to the public at large about El Paso County by the Proclamation, and efforts to combat that message); Samaniego Decl. ¶¶ 6–13 (same); Garcia Decl. ¶¶ 11–32, ECF No. 55-27 (same). Accordingly, the vague and unsubstantiated allegations of harm contained in the Plaintiffs’ declarations based on the message of the President’s Proclamation cannot be used to support sweeping injunctive relief for a claimed violation of the CAA.

Plaintiffs rely upon *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), as the basis for a nationwide injunction in this case, but it is inapposite for two reasons. First, the Fifth Circuit concluded that the plaintiffs, due to their status as states, were “entitled to ‘special solicitude’ in our standing inquiry” under Article III, which neither Plaintiff is entitled to here. 809 F.3d at 151. Second, this case does not present the “uniformity” concerns that influenced the *Texas* court. The Fifth Circuit was concerned that enjoining DAPA in some states, but not others, would have led to immigration laws not being enforced in a uniform way, and “would be ineffective because DAPA beneficiaries would be free to move among states.” *Id.* at 187–88. Plaintiffs have not shown that their remedy would be “ineffective” if not extended nationwide, or that the sort of disunity the *Texas* court relied upon would arise if some projects along the southern border go forward but others do not. Therefore, as Defendants have already explained in prior briefing, the absolute most Plaintiffs are entitled to is an injunction prohibiting DoD from using the \$20 million in military construction funds initially

⁴ BNHR sought relief only on behalf of itself as an organization, not associational standing on behalf of its members who reside in southern New Mexico.

associated with for Fort Bliss. Defs.’ Supp. Br. Re. § 2808 at 14–15, ECF No. 126.

IV. A Declaratory Judgment Against the Proclamation Should Not Issue.

Plaintiffs’ proposed order also seeks a declaration that the Proclamation “is unlawful” insofar as it makes certain funds available for § 2808 construction. There are two problems with such relief. First, the request is tantamount to the entry of declaratory relief against the President, who issued the Proclamation. As explained in Defendants’ earlier briefing, such relief is not appropriate, particularly when relief can be obtained against other executive branch officials. Defs.’ MSJ 28–30, ECF No. 95. *See Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment”).

Second, such an order would not be appropriate in light of the Court’s merits determination, which did not conclude the Proclamation was unlawful. It simply determined that the use of § 2808, which was the result of a subsequent decision by the Secretary of Defense to authorize construction, was inconsistent with the CAA. Thus, no declaratory judgment should issue against the Proclamation.

V. The Court Should Enter an Administrative Stay of Any Injunction.

In the event the Court grants Plaintiffs any injunctive relief, the Court should issue an administrative stay of that order while this Court, and if necessary the Fifth Circuit, considers whether to grant a full stay of that injunction pending appeal. *See* Fed. R. App. P. 8. The purpose of an administrative stay would be to give the Court sufficient opportunity to consider the merits of any motion for a stay pending appeal. *See, e.g., M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 247 (5th Cir. 2018) (administrative stay granted and later converted into a stay pending appeal); *In re Grand Jury Proceedings*, 841 F.2d 230, 232 (8th Cir. 1988) (describing grant of temporary stay to consider motion for stay pending appeal). In light of the Government’s compelling interest in border barrier construction, the Government should be given fair opportunity to seek a stay pending appeal from

this Court and, if necessary the Fifth Circuit, before the disruptive impact of an injunction takes effect.

CONCLUSION

For these reasons, no injunction should issue in this case, and the Court should reject the Plaintiffs' proposed judgment. To the extent the Court enters an injunction, Defendants request that the Court immediately enter an administrative stay of that injunction in order to allow Defendants to litigate a motion for a stay of the injunction pending appeal before this Court and, if necessary, the Fifth Circuit.

Dated: October 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the clerk using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

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